Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PHIL BERG
vs.
LOUIS B. KOZLOFF

On Petition for Writ of Certiorari From the
Supreme Court of Pennsylvania,
No. 39 M.D. Appeal Docket 1998

PETITION FOR A WRIT OF CERTIORARI

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45 pp.

QUESTION PRESENTED

Pursuant to the Pennsylvania statute 25 P.S. 2872.1(3), the only state with a county requirement without regard to population, which requires a candidate for governor to have 2,000 signatures including 100 in at least ten counties, Petitioner's name was stricken from the primary election ballot in which he sought the Democratic gubernatorial nomination, after a challenge in which it was determined that his total number of signatures (over 3,000) fell five short of the tenth county requirement. The Supreme Court of Pennsylvania in affirming the Commonwealth Court's ruling as to the constitutionality of the election code provision raises the question presented herein. Is the Pennsylvania statute, which requires a gubernatorial candidate to have 2,000 signatures including at least 100 signatures in ten counties without regard to an equality of population distribution within Pennsylvania's 67 counties, unconstitutional and is violative of Petitioner's rights since it denies ballot access, violative of the right of association, the right of franchise and of equal protection and due process of the First and Fourteenth Amendments of the U.S. Constitution? Ancillary to the issue is that of the appropriate standard of review; that of strict scrutiny rather than rational basis; and of the proper classification of the gubernatorial election as subject to one person - one vote principle.

PARTIES TO THE PROCEEDING

Petitioner---Phil Berg, Democratic Candidate for the Office of Governor of Pennsylvania.

Respondent---Louis B. Kozloff

Pursuant to Pa. R.C.P. 235, and U.S. Supreme Court Rule 29.4(c), the Attorney General of the Commonwealth of Pennsylvania has been given notice of this appeal.

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A. Opinion of the Supreme Court of Pennsylvania, Middle District, dated May 15, 1998, and filed in support of the per curiam order of the Court dated May 11, 1998.....1a - 10a

B. Opinion of the Commonwealth Court dated April 7, 1998.....11a - 26a

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OPINIONS BELOW

The unreported Opinion of the Supreme Court of Pennsylvania, Middle District, dated May 15, 1998, and filed in support of the per curiam order of the Court dated May 11, 1998, is produced in Appendix A, page 1a.

The reported Opinion of the Commonwealth Court dated April 7, 1998 is produced in Appendix B, page 11a.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on May 11, 1998 - (Appendix A). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions.

The First Amendment of the United States Constitution provides, in pertinent part:

Congress shall make no law...

> abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; or deny any person within its jurisdiction the equal protection of the laws.

STATUTES AND PROCEDURAL RULES INVOLVED

Pennsylvania statute 25 P.S. 2872.1(3) (Act of June 3, 1937, P.L. 1333) provides:

> Candidates for nomination of offices listed below shall present a nominating

> petition containing at least as many valid signatures registered and enrolled members of the proper party as listed below:
> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the
Associate Justices of the Supreme Court:

Phil Berg Petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

STATEMENT OF THE CASE

Petitioner Phil Berg entered a serious and substantial

campaign to run for Governor of Pennsylvania in the Democratic primary scheduled on May 19, 1998. On March 10, 1998, Berg filed a Nomination Petition of 3,056 signatures from 36 counties and 100 or more from ten counties. On March 17, 1998, a challenge was filed as to the signatures from Dauphin County, which resulted in the Commonwealth Court ruling that Berg was five signatures short of the 100 signature requirement in Dauphin County, thereby resulting in only nine county compliance of the ten county requirement. As part of the hearing, Berg raised a challenge to the constitutionality of the statute resultant from the unequal population distribution within the counties and the disparate effect that the statute had upon equal protection and due process.

On April 7, 1998, Judge Doyle of the Commonwealth Court entered an Order striking the name of Berg from the primary election ballot and denying the constitutional challenge to the statute. A timely appeal was thereafter filed to which the Supreme Court of Pennsylvania affirmed the decision of the Commonwealth Court.

PENNSYLVANIA SUPREME COURT PROCEEDING:

Timely notice of Appeal to the Supreme Court of

Pennsylvania was filed by Berg and resulted in the affirming of the decision of the Commonwealth Court. The inquiry was focused upon the constitutionality of the statute at issue, affirming the application of the rational basis test rather than strict scrutiny on the basis that the signature requirement did not have an appreciable impact on the franchise rights of voters and further opining that the state interest in managing ballot size and ensuring the seriousness of candidates provided a rational basis for the statute.

PENNSYLVANIA COMMONWEALTH COURT PROCEEDING:

Before the Commonwealth Court was the petition to set aside the nomination petition of Phil Berg as a candidate for the office of Governor as well as Berg's motion to dismiss based upon the challenge to the constitutionality of the election code, Act of June 3, 1937, P.L. 1333 as amended 25 P.S. 2872.1(3). The Opinion and Order by the Honorable Joseph T. Doyle was dated April 7, 1998, setting aside the nomination petition and holding the election code provision as constitutional.

In his address, Judge Doyle first determined the level of

review to be applied to the election code provision as that of rational basis, rejecting that the provision affected a fundamental right which in turn would require strict scrutiny. Further the Court opined that the "one man - one vote" principle is not implicated by an executive office.

> Clearly the governor is not a legislator in the sense that he does not espouse the cause of a particular constituency, but is rather the chief executive. Therefore, the representational concerns at the core of the one man - one vote principle does not apply.

In applying the rational basis test, the Court noted that the avoidance of ballot clutter and the securing of obtaining signatures beyond the most populous of counties as mandated by the ten county requirement sufficiently supports the state purpose:

> ...[this] minimal inequality is insufficient to support a finding that the statute fails the rational basis test.

Accordingly, the provision within the election code was held as constitutional and the nomination petition of Berg was set aside and his name stricken from the ballot.

REASONS FOR GRANTING THE WRIT

The decision in this case in which the requirement of 25 P.S. 2872.1(3) of obtaining 100 signatures from at least ten counties in order to fulfill the gubernatorial nomination petition for ballot placement in Pennsylvania was deemed constitutional stands as a violation to the First and Fourteenth Amendments, denying equal protection, due process, right of association, and the right of franchise. Any procedures enacted by the state as an integral part of the election process must neither abridge nor dilute the right to vote, and, if they do so, are so far departed from constitutional principles as to merit review by this Honorable Court.

Petitioner's constitutional claim rests upon the clauses of the First and Fourteenth Amendments in his challenge to a 1937 Pennsylvania election code provision that in essence disregards population distribution of the 67 counties, violates the one person -

one vote principle and dilutes or debases the weight of a citizen's vote.

When a state makes classification as to voters which favor residents of one county over another, a justiciable controversy is presented, for the right of suffrage can be denied by debasement or by dilution as well as by the prohibition of a citizen's free exercise. Moore v. Ogilvie 394 U.S. 814, 89 Sup. Ct. 1493 (1969). It was the Supreme Court that found an Illinois statute which required nomination petitions to be signed by 25,000 voters, including 200 from a minimum of 50 counties to be in violation of due process and equal protection. It was noted that the law applied a rigid formula contrary to the constitutional theme of equality among citizens exercising their right to vote and accordingly could not stand.

This principle of one person - one vote was held to be applicable not only to elections as to representative races, but to executive as well. Caselaw has deemed the principle applicable to the candidacy for electors of the President and Vice President. (Moore v. Ogilvie, 394 U.S. 814, 89 Sup. Ct. 1493 [1969]); to the Presidency (McCarthy v. Garrahy, 460 F. Supp. 1042, [U.S.D.C., R.I., 1978]; Udall v. Bowen, 419 F. Supp. 746 [S.D. Indiana 1976]).

The one person - one vote principle stands in conflict with the idea that one group can be granted greater voting strength than another. Statutes that have imposed that inequity by enacting distributive requirements for candidate nominating petitions have been stricken as a grave infringement to the Constitution. Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (U.S.D.C., S.D. New York, 1970). This case was affirmed summarily by the U.S. Supreme Court, 400 U.S. 806 (1970). And it has been held that the imposition of even a lesser burden as to distribution requirements within a statute still constitutes an inequality in voting power that can not stand. McCarthy v. Garrahy, 460 F. Supp. 1042 (1978).

In McCarthy, signatures from only five counties were required. In both Blomquist v. Thomsen, 739 F.2d 525 (1984, 10th Circuit) and Communist Party v. State Board of Elections, 518 F.2d 517 (1975, 7th Circuit), signatures from only two counties were required. (It must be noted that in Communist Party, Petition for A Writ of Certiorari was denied by the U.S. Supreme Court). All of these laws were held to be unconstitutional. The statute at issue in Pennsylvania requires signatures from ten counties and further was declared unconstitutional in an unreported U.S. District Court decision in 1979 to which the state did not appeal. The legislature merely repealed it for the offices of U.S. Senator and President but

failed to do so for the office of Governor.

The assessment of any burden imposed by statute regarding the right or power of the vote is reviewed via strict scrutiny. Where the basic right of voting is diluted, the standard of strict scrutiny must be applied, no matter how insignificant the burden on access to the ballot may be. McCarthy.

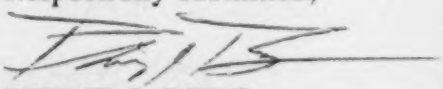
The Pennsylvania statute at issue is the last vestige of signature requirements tied to counties with no regard to the distribution of population. Its effect is undeniable; it stands in violation to the First and Fourteenth Amendments to the Constitution; it challenges the fundamental right to vote and the ancillary principle of one person - one vote. Under its proper review of strict scrutiny, the statute can not stand.

Although Certiorari is rarely granted, in light of the violations to the Constitution that this statute represents, we pray that relief is granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Appendix A

APPENDIX A: OPINION OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT, DATED MAY 15, 1998, AND FILED IN SUPPORT OF THE PER CURIAM ORDER OF THE COURT DATED MAY 11, 1998.

[J-86-1998]
THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN THE MATTER OF: THE NOMINATION PETITION OF PHIL BERG, DEMOCRATIC CANDIDATE FOR THE OFFICE OF GOVERNOR	:	No. 39 M.D. Appeal Docket 1998
APPEAL OF: PHIL BERG	:	Appeal of the Order of the Commonwealth Court at No. 250 M.D. 1998, dated April 7, 1998.
	:	SUBMITTED: APRIL 22, 1998

OPINION

MR. JUSTICE ZAPPALA **FILED: MAY 15, 1998**

This opinion is filed in support of the per curiam order of this Court dated May 11, 1998. The order affirmed an order entered by Judge Doyle of the Commonwealth Court which granted a petition to set aside nomination petition.

Appendix A

On or about March 10, 1998, Phil Berg, Appellant, filed a Nomination Petition with the Secretary of the Commonwealth of Pennsylvania for the office of Governor in the Democratic primary. Berg obtained over 3,000 signatures from 36 different counties in the Commonwealth. Louis Kozloff, Appellee, subsequently filed a Petition to Set Aside the Nomination Petition wherein he contended that Berg did not have 100 valid signatures of Democrats from each of ten counties. Berg filed a Motion to Dismiss the challenge in which he alleged that section 912.1(3) of the Election Code,[1] was unconstitutional.

That section provides as follows:

> Candidates for nomination of offices as listed below shall present a nominating petition containing at least as many valid signatures of registered and enrolled members of the proper party as listed below:
>
> > (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 P.S. §2872.1(3).

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[1]Act of June 3, 1937, P.L. 1333, 25 P.S. §2872.1(3).

Appendix A

Berg argued that because of the unequal distribution of population in Pennsylvania's 67 counties, the requirement of 100 signatures from ten counties violated due process, equal protection and the one person/one vote principles pursuant to the First and Fourteenth Amendments of the United States Constitution. He contended that because less populous counties have fewer electors, the signatures of those electors are more "valuable" than those of more populous counties such as Philadelphia or Allegheny. He further contended that the strict scrutiny standard of review should apply.

By Memorandum and Order dated April 7, 1998, Judge Doyle of the Commonwealth Court granted the Petition to Set Aside the Nomination Petition and struck Berg's name from the primary election ballot.[2] He declined to employ the strict scrutiny standard of review on the ground that no fundamental rights were affected by the ten county signature requirement. Judge Doyle held that the one

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[2]Prior to the Commonwealth Court's decision, Berg sought a preliminary injunction in the United States District Court for the Eastern District of Pennsylvania, to enjoin the enforcement of the statute. The court denied the request for a preliminary injunction. Berg's appeal to the United States Court of Appeals for the Third Circuit is currently pending.

person/one vote principles were not applicable in a case involving the nomination of a candidate for Governor because there is no question of unequal *representational* rights.

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Applying the rational basis test, Judge Doyle concluded that the state has several legitimate interests in the statutory signature requirement. He found that the provision keeps the ballot free from chaos by requiring the candidate to have some statewide support and ensures that candidates do not merely obtain signatures from the most populous counties of the Commonwealth. Because the signature requirement was rationally related to the furtherance of the Commonwealth's interest concerning the ballot, Judge Doyle found that it passed constitutional muster. As Berg conceded that his petition did not contain valid signatures of 100 Democratic electors from each of ten counties, further analysis was unnecessary.[3]

Likewise, our inquiry involves only the constitutionality of Section 912.1(3) of the Election Code, as it is undisputed that the

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[3]Berg also filed in our Court an emergency motion to stay the printing of the ballot, which we denied on April 24, 1998.

statutory requirement was not satisfied. We must first identify the type of interest affected by the statutory classification so that we may determine the appropriate standard of review.

> Under a typical fourteenth amendment analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review. The first type - classifications implicating neither suspect classes nor fundamental rights - will be sustained if it meets a "rational basis" test. In the second type of cases, where a suspect classification has been made or a fundamental right has been burdened, another standard of review is applied: that of strict scrutiny. Finally, the third type of cases, if "important" though not fundamental rights are affected by the classification, or if "sensitive" classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review.
>
> [J-86-1998] - 3 -

James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 145, 477 A.2d 1302, 1305-1306 (1994).

We also recognize that when assessing the merits of a

constitutional challenge to a provision of a state's election code, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3rd Cir. 1997).

Berg contends that the strict scrutiny standard of review should apply to ballot issues in the electoral process because the fundamental right to vote is affected. He primarily relies on the United States Supreme Court's decision in Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493 (1969). In Moore, independent candidates for the office of President of the United States challenged an Illinois law that required candidates to obtain 25,000 signatures, at least 200 from each of 50 of the state's 102 counties, before their names were placed on the general election ballot. The population disparity in

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Illinois was such that 93.4% of the population resided in the 49 most populous counties, with 6.6% of the population residing in the remaining 53 counties. Under the challenged statute, the 6.6% minority could effectively block a candidate from appearing on the ballot against the desires of the majority even though it could not have defeated the candidate in the general election. Accordingly, the Court ruled that the new law unconstitutionally diluted the vote of the more populous counties in the state and

therefore lacked the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.

Moore is distinguishable, however, in two respects. First, the ten most populous counties in Pennsylvania comprise only 59% of the Democratic electors in the Commonwealth, with the remaining 41% distributed among the other 57 counties in the state. Thus, unlike Moore, the instant case does not present a situation where a scant minority of voters in rural areas could "veto" the wishes of the majority. Second, both the number and percentage of counties from which signatures were required was far greater in

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Moore than that imposed by section 912.1(3). In Moore, the statute required 200 signatures from each of 50 of the state's 102 counties, or 49% of the counties in the state. Here, a candidate is only required to obtain 2,000 signatures, at least 100 from each of 10 of the state's 67 counties, or 14.9% of the counties in the state.

This case is more analogous to Cavanaugh v. Schaeffer, 444 A.2d 1308 (Pa. Cmwlth. 1982), where the constitutionality of Section 912(b) of the Election Code[4] was challenged. That provision requires candidates for the office of Justice of the Supreme Court of Pennsylvania to obtain 100 valid signatures from each of 5 counties. The challenge was based on the ground that the geographic distribution requirement set forth in the Election Code violated the equal protection clause of the Fourteenth Amendment.

The Commonwealth Court upheld the constitutionality of the statute. It distinguished Moore v. Ogilvie, finding that the population disparity in

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[4]Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §2872(b).

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Pennsylvania did not create a situation where a minority of the population possessed a veto power over that of the majority. The court relied upon the proposition that a "discriminatory law must have a real and appreciable impact on voters' rights before the strict scrutiny test of reasonable necessity would be applied in the challenge." Cavanaugh at 1311, citing Bullock v. Carter, 405 U.S. 1234, 144 (1972). It concluded that the signature requirement had no "real and appreciable impact" on the franchise rights of voters and therefore the rational basis test applied. The court held that the state's interests in managing ballot size and in ensuring that there are serious candidates who have a significant modicum of support, provided a rational basis for the challenged law.

Similarly, we find that requiring a candidate to obtain 100 signatures from at least ten counties in the Commonwealth does not have a real and appreciate impact on voter's rights. The state's interest in managing the ballot size and ensuring statewide support for candidates provides a rational basis for the provision.

Although voting is of the most fundamental significance under our constitutional structure, the right to associate for political purposes through the ballot is not absolute. Burdick v. Takushi, 504

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U.S. 428, 112 S. Ct. 2059 (1992). To subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest would be the hands of states seeking to assure that elections are operated equitably and efficiently. Id.

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Accordingly, we find that section 912.1(3) of the Election Code is constitutional. Because Berg failed to obtain 100 signatures from each of at least 10 counties, the Commonwealth Court properly granted the motion to set aside nomination petition.[5]

Mr. Chief Justice Flaherty concurs in the result.

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[5]Berg also contends that the challenge to his nomination petition lacked the required specificity. This claim is meritless as Berg concedes that the petition to set aside nomination petition listed the page number, page and line of each challenged signature and noted that the signatory was not registered in Dauphin County.

Appendix B

APPENDIX B: OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED APRIL 7, 1998.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN THE MATTER OF: THE NOMINATION PETITION OF PHIL BERG, DEMOCRATIC CANDIDATE FOR THE OFFICE OF GOVERNOR	:	No. 250 M.D. 1998
	:	HEARD: March 30, 1998
LOUIS B. KOZLOFF, Petitioner	:	

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE DOYLE **FILED: April 7, 1998**

Before this Court is the petition to set aside the nomination petition of Phil Berg as a candidate, in the primary election of the Democratic Party, for the office of Governor. Additionally before the Court is Berg's motion to dismiss the petition to set aside based

on a challenge to Section 912.1(3) of the Election Code,[1] on constitutional grounds.

The challenge to Berg's nomination petition alleged that, although Berg had accumulated over 3000 signatures statewide, he failed to obtain 100 valid signatures from Democratic electors of 10 counties within the Commonwealth. Specifically, the petition alleged that although Berg had 100 signatures from 9 counties, he did not have 100 valid signatures from Dauphin County, the required tenth county. First, however, we will address Berg's motion to dismiss based on constitutional grounds, because, if we conclude that Section 912.1(3) is unconstitutional, we need not address the issue of whether Berg complied with that Section.

Section 912.1 of the Election Code provides as follows:

> Candidates for nomination of offices as listed below shall present a nominating petition containing at least as many valid signatures of registered and enrolled members of the proper party as listed below:
>
> . . . .

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[1]Act of June 3, 137, P.L. 1333. as amended. 25 P.S. §2872.1(3).

Appendix B

> (3) Governor: Two thousand including at least one hundred from each of at least ten counties.

25 P.S. §2871.1(3) (Ibid). In his petition to dismiss the challenge to his nomination petition, Berg alleges that the requirement of 100 signatures from 10 counties does not in any way reflect the relationship of the population in each county. Therefore, because less-populous counties of this Commonwealth have fewer electors, the signatures of those electors are more "valuable" than those of electors of more populous counties such as Philadelphia or Allegheny.[2] Thus, Berg argues,

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[2]According to the results of the 1990 Census contained in the most recent edition of The Pennsylvania Manual, Volume 113, the top ten counties by population are Philadelphia (1,585,577), Allegheny (1,336,449), Montgomery (678,111), Delaware (547,651), Bucks (541,174), Lancaster (422,822), Chester (376,396), Westmoreland (370,321), York (339,574), and Berks (336,523).

Moreover, by counting only the number of Democratic electors registered to vote in the 1996 General election, the top ten most populous counties are Philadelphia (689,880), Allegheny (517,580), Montgomery (139,401), Westmoreland (130,406), Bucks

application of Section 912.1(3) of the Election Code dilutes the signature of the elector in the more populous areas in violation of the "one man - one vote principle," announced by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962).

At the outset, we note that when assessing the merits of a constitutional challenge to a provision of a state's election code, a court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of those interests; it also

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(124,270), Luzerne (101,503), Delaware (93,686), Lackawanna (85,436), Berks (84,575), and Erie (84,445). The Democratic population of these counties equals approximately 59% of the registered Democratic electors in the Commonwealth.

must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Council of Alternative Political Parties v. Hooks, 121 F.3d 876 (3d. Cir. 1997).

In addressing Berg's challenge, we must first determine what level of review is given to Section 912.1(3). It is well settled that laws which affect a fundamental

right, such as the right to vote, or discriminate against a suspect class of citizens, are subject to strict scrutiny. Brown v. Borough of Mahaffey, 35 F.3d 846 (3d Cir. 1994). Under a strict scrutiny analysis, the burden is on the government to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest. United States v. Burroughs, 897 F. Supp. 205 (E.D. Pa. 1995). Conversely, if a law does not significantly affect a fundamental right or involve a suspect class, it is subject to a rational basis review by the Court. Cavanugh v. Schaeffer, 444 A.2d 1308 (Pa. Cmwlth. 1982) [Ibid]. Under this standard, it is the

plaintiff who bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest. Hahn v. United States, 757 F. 2d 581 (3d Cir. 1985).

In arguing for application of the strict scrutiny standard, Berg initially argues that the current requirements of the Election Code violate the one man - one vote principle, and thus affects a fundamental right, i.e. the right to vote. In support of his argument, Berg initially points to the United States Supreme Court decision in Moore v. Ogilvie, 394 U.S. 814 (1969). In Moore, the Court examined a constitutional challenge to an Illinois law requiring 25,000 signatures statewide, including 200 signatures from 50 of the state's 102 counties before a candidate could be placed on the ballot in the primary election for the office of President of the United States. The population in Illinois was such that 93.4% of the state's population resided in 49 of the counties. Because 6.6% of the remaining population residing in the remaining 53 counties could place a candidate on the ballot, the Court ruled that the law unconstitutionally diluted the "vote" of the more populous counties in the state. Moore has been used as support for striking down

several provisions of other states' election codes. See Socialist Labor Party v. Rhodes, 318 F. Supp. 1262 (S.D. Ohio 1970), appeal dismissed, 409 U.S. 942 (1972) (striking down an Ohio statute requiring independent candidates to have 200 signatures from at least 30 of the state's 80 counties); Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D.N.Y.), aff'd, 400 U.S. 806 (1970) (striking down a New York law requiring at least 50 signatures from each county in the state). The Court's concern in the above cases involved the apparent "veto" power granted to a minority of the population to frustrate the apparent will of the majority as evidenced by a candidates apparent support in populous counties. See Buckley v. Valeo, 424 U.S. 1 (1976).

However, in Valeo, the Court upheld a portion of the federal financing laws which required candidates to run in 20 state primary elections in order to receive primary election funds. In doing so, the court noted that, in Moore, Illinois attempted to ensure that a candidate had statewide support before being placed on the ballot. The Illinois statute at issue in Moore permitted 7% of the state's population residing in the state's least populated 53 counties, to

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"block" the nomination of a candidate, assuming that all of them refused to sign a candidate's nomination petition. In the present case, the top ten most populated counties in Pennsylvania comprise only approximately 59% of the Democratic electors in the Commonwealth. The remaining 41% are distributed within the other 57 counties of the Commonwealth. Thus to successfully "block" the nomination of a candidate in Pennsylvania, (i.e. if a candidate collected 100 signatures from only 9 of the top 10 counties and could not obtain 100 signatures in any one of the remaining 58 small counties), it would take approximately 42% of the state's Democratic

Electors remaining, all refusing to sign the candidate's bid for nomination. It is obvious, therefore, that Pennsylvania's system is not nearly the alleged draconian plan struck down in Illinois, in Moore.

Additionally, the present case is easily distinguished from Moore, and the other cases cited above which followed Moore, in

another significant respect. In all of those cases, both the number and the percentage of counties from which signatures were required was far greater than that imposed by Section 912.1(3). In Moore, the statute at issue required 200 signatures from 50 of the state's 102 counties, or 49% of the counties in the state. In Rockefeller, the statute required 200 signatures from 30 of the 88 counties in the state, or 34% of the counties in the state. By contrast, Section 912.1(3) requires 100 signatures from only 15% of the counties within the Commonwealth.

Moreover, the case now before the Court does not implicate the "one man - one vote" principle. As this Court stated in Cavanaugh,

> The one person - one vote principle, upon which the candidate relies, as initially announced in Baker v. Carr was designed to remedy the unequal representational rights of voters. "The first principle inherent in our republican form of government is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among the several districts within the political unity, then the voting

strength of the individual citizens in these subdivisions is of unequal weight."

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Cavanaugh, 444 A.2d at 1312 (quoting Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1960), appeal dismissed, 385 U.S. 3 (1966)). The present case does not involve an issue of unequal representational rights. The candidate is seeking his political party's nomination for the executive office of Governor. Clearly the governor is not a legislator in the sense that he does not espouse the cause of a particular constituency, but is rather the chief executive of the Commonwealth as a whole. Therefore, the representational concerns at the core of the one man - one vote principle are not present here and, thus, that principle does not apply.[3] Therefore, no

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[3]We note that we are not presented with a case involving voting power, but only "nominating power." We are mindful of the words of Justice Stewart in Moore in which he concluded that

> I cannot join in the Court's casual extension of the "one voter, one vote" slogan to a case that involved neither voters [or] votes...

fundamental rights are affected by the 10-county requirement.

Furthermore, the rational basis standard seems more applicable in this case given the greater deference and leeway extended to state elections as compared with the scrutiny of federal election cases. See Cavanaugh 444 A.2d at 1312 n.7. Because we conclude that the one man/one vote principle is not involved in the present case, therefore, neither is a fundamental right. Therefore, we must examine Section 912.1(3) under the rational basis standard.[4]

Moore, 394 U.S. at 818 (Stewart, J., dissenting). Likewise, in the present case, signing a nomination petition does not obligate any individual to vote for that candidate, but is meant to demonstrate only that the candidate has sufficient support throughout the state to ensure that his or her candidacy is not entirely frivolous and that the candidate has at least some area wide, if not statewide, appeal, which, of course, is a most legitimate state interest.

[4]We note that, even if Section 912.1(3) were to be considered under the strict scrutiny standard, the state's interests in keeping an organized ballot and requiring a candidate to demonstrate sufficient statewide support would be sufficiently compelling to uphold the statute. See Cavanaugh (citing American

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As such, it is Berg's

burden to demonstrate that Section 912.1(3) is not rationally related to a legitimate governmental interest. Hahn.

Applying the rational basis test, it is clear that the state has several legitimate interests in the signature requirements of Section 912.1(3), namely keeping the ballot free from chaos and requiring a modicum of area wide, if not statewide, support for a candidate. First, Section 912.1(3) ensures that the ballot will not be cluttered with candidates having only small, local support. Second, and perhaps more important to this case, it is clear that the 10-county requirement is designed to ensure that candidates do not merely obtain signatures from the most populous counties of the Commonwealth. No Gubernatorial candidate could satisfy the requirements of Section 912.1(3) without obtaining signatures of electors who are residents of at least some third through eighth class

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Party of Texas v. White, 415 U.S. 767 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

counties.[5] Section 912.1(3), is, therefore, rationally related to the furtherance of these objectives.

In response, Berg asserts that the state's interest in keeping an orderly ballot and requiring a candidate to demonstrate statewide support is neither a compelling nor legitimate governmental interest because there are alternative ways to achieve

such a purpose. We disagree. Any possible alternative to the county requirement would require either a "flat" number of signatures to have a candidate's name placed on the ballot, or would require signatures from a subdistrict in the state that would have a population base. Clearly, this would not provide sufficient evidence

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[5]There is only one first class county, Philadelphia, and only one second class county, Allegheny. There are three second class A counties, Montgomery, Delaware, and Bucks. Thus, assuming that a candidate obtained 100 signatures from registered voters of the candidate's party in these five counties, he would still need 100 signatures from the electors in 5 of the other 62 counties designated as third class or lower.

of statewide support as a candidate could easily obtain twice the number of signatures currently required in either Allegheny or Philadelphia County alone.

Berg suggest that the commonwealth could achieve the same purpose by requiring a certain number of signatures from each congressional district because congressional districts are established on a population basis. Although it is certain that the population is more evenly divided in the congressional districts, this alternative would not achieve the same purpose as the current system. Pennsylvania has 20 congressional districts. Assuming arguendo that the Commonwealth adopted a system whereby a candidate needed to obtain 100 or more signatures from 10 of the 20 congressional districts (of course this would be a greater percentage, 50%, than the amount of counties currently required, which is approximately 15% or 10 out of 67 counties), a candidate could easily meet that requirement without evidencing statewide support. For instance, Philadelphia County encompasses the first, second, and third congressional districts. In addition, Allegheny County encompasses the fourth, fourteenth, eighteenth, and twentieth congressional districts. Thus, by collecting signatures in two counties of the Commonwealth, a candidate would have signatures from seven of

the ten required congressional districts. This would eviscerate one of the purposes underlying Section 912.1(3) of the Election Code. Thus, while it is clear that Section 912.1(3) does result in a minimal amount of inequality throughout the

Commonwealth, this minimal inequality is insufficient to support a finding that the statute fails the rational basis test. See Donatelli v. Mitchell, 2 F.3d 508 (3d. Cir. 1993). We, therefore, conclude that Berg has failed to carry his heavy burden of demonstrating that Section 912.1(3) is not rationally related to the furtherance of the Commonwealth's interests concerning the ballot.

Accordingly, we hold that Section 912.1(3) of the Election Code is constitutional, and we therefore turn to the petition to set aside Berg's nomination petition which alleges that he did not satisfy the requirements contained in that section.

At the hearing held on March 30, 1998, Berg was present and represented by counsel. Following a colloquy on the record, Berg, through his counsel, conceded that his petition did not contain

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the valid signatures of 100 Democratic electors in Dauphin County. On the basis of this concession, and our conclusion that Section 912.1(3) of the Election Code is constitutional, this Court will enter an order setting aside the nomination petition filed by Phil Berg and ordering the Secretary of the Commonwealth to remove Phil Berg's name from the Democratic ballot for the office of Governor for the May 1998 primary.

/s/
JOSEPH T. DOYLE, Judge

Appendix C

APPENDIX C: PROOF OF SERVICE.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

IN THE MATTER OF: THE NOMINATION PETITION
OF PHIL BERG, DEMOCRATIC CANDIDATE
FOR THE OFFICE OF GOVERNOR OF PENNSYLVANIA
APPEAL OF PHIL BERG

PROOF OF SERVICE

I, Philip J. Berg, Esquire hereby certify that copies of the foregoing Petition for a Writ of Certiorari were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United States post office or mailbox this 7th day of August, 1998, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

Appendix C

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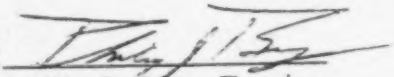
By: 
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